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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 700

ELECTRIC BOND AND SHARE COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD, *et al.*, ALFRED B. CORNELL, *et al.*, and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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I.

The brief for the Securities and Exchange Commission (the Commission) in opposition to the granting of the present petition concedes the principal point in the petition. This point is that the primary legal issues in the present case and in the *Federal* case are similar, if not identical. The language of the Commission's brief in this connection is

> "We agree that there is a close relationship between the primary legal issues in the two cases."

This concession by the Commission is entirely consistent with the fact that the Commission withheld its decisions in the present case and in the *Federal* case for over two years and then handed down its orders determining the two cases on the same day.

Contrary to contentions of certain of the respondents, "judicial economy" dictates that the petitioner be relieved of going through appellate proceedings in the Court of Appeals for the Second Circuit in the present case, which would likely be futile in the light of that Court's recent position on similar issues in the *Federal* case. This Court should review the two cases simultaneously in the interest of economizing the time of everyone involved.

II.

The primary legal issue common to the present case and the *Federal* case involves the effect which should be given to charter "liquidation" provisions upon the retirement of preferred stocks of companies subject to the Public Utility Holding Company Act of 1935 (the Act) in situations where, although such retirement was effected as a part of a liquidation or distribution of capital consummated by the Company in connection with plans filed with the Commission under Section 11(e) of the Act, the liquidation or distribution of capital could have been, and indeed probably would have been, carried out without the aid or compulsion of Section 11.

In its brief in opposition to the petition filed in the *Federal* case, the Commission fully argues its position that this Court in the *Engineers* case has in effect already decided the primary legal issues common to the *Federal* case and the present case. In its argument the Commission entirely overlooks the language of the opinion of this Court in the

Engineers case (quoted in our petition, p. 16), to the effect that a charter provision which could be called into play absent the Act must be considered as the ceiling on the claims of preferred stockholders under the "fair and equitable" federal rule of law. This principle, enunciated in the *Engineers* case, when applied to the different factual situations in the *Engineers* case and the present case, constitutes a vital distinguishing factor between the two cases. In fact, the decision of the District Court in the present case, as stated in our petition (p. 17), is inconsistent with the fundamental premise of the *Engineers* case that the impact of the Act should not result in a shifting of values from one class of security to another. Other distinctions between the *Engineers* case and the present case are pointed out in our petition at pages 13-18.

This Court should not be misled by statements made and inferences drawn, either wittingly or through inadvertence, in the briefs of respondents to the effect that factual, rather than legal, issues are presented to this Court by the petition. For instance, with respect to the primary legal questions regarding the effect of the charter "liquidation" provisions, we do not question the Commission's findings of fact (our petition, pp. 18-19, 22). We contend that wholly as a matter of law the Commission erred in not following its own previous rule exemplified by the *El Paso* case, and that such error, common to the present case and the *Federal* case, resulted in a decision by the Court of Appeals for the Second Circuit of a federal question in a way probably in conflict with applicable decisions of this Court or, at the very least, in a decision of an important question of federal law which has not been, but should be, settled by this Court.

We have pointed out (our petition, pp. 27-28) the manner in which the District Court in the present case

misapprehended questions of both law and fact in erroneously holding that the petitioner's charter "liquidation" provisions were not applicable. Such erroneous action by the District Court certainly should not prevent the petitioner from seeking a review by this Court of the District Court's decision along with other legal determinations made below.

III.

The brief submitted on behalf of respondents (other than the Commission) argues that our petition should be denied because it presents to this Court, in addition to the primary legal issues which are common to the present case and the *Federal* case, other legal questions which we believe it is appropriate for this Court to determine. Such argument wholly lacks merit.

In the first place, even if it be assumed *arguendo*, that some of the legal issues presented to this Court by our petition are not identical to the issues presented by the petition in the *Federal* case, nevertheless such a situation should not form a basis for the denial of our petition. Once it is clear that the *primary* legal questions are common to the two cases, it is wholly consistent with judicial economy to request that while this Court is determining such major joint issues of law, it also decide ancillary issues in the same cases already before the Court.*

* In this connection your petitioner is not presently arguing the contention that the findings of the Commission respecting the investment value of the $6 preferred stock are not supported by substantial evidence on consideration of the record as a whole. On the contrary petitioner, in accordance with what we understand to be common practice before this Court, merely desires at the present time to reserve its right to press such a contention before this Court in the event that our petition is granted and in the event petitioner later determines that it is appropriate to argue the contention.

Moreover the additional legal issues in the present case are generally similar to those in the *Federal* case. For instance, Federal raises a legal issue as to the proper rule, in determining investment value, for the treatment of securities which the holding company will not have after consummation of the plan involved, and for the handling of the assumed return on cash which can only be invested under the stringent requirements of the Act. The petitioner raises substantially the same issue. Also, as respondents concede, issues respecting the question of the propriety of interest payments to the preferred stockholders involved are common to the two cases.

IV.

The briefs for respondents seek, by divergent arguments, to advance some reason for denying the petition arising because of the fact that the representative of certain holders of the former $5 preferred stock of the petitioner has taken an appeal to the Court of Appeals for the Second Circuit from that part of the order of the District Court which affirmed the Commission's determination that the investment value of such $5 preferred stock did not exceed $100 per share, plus accumulated dividends.

We do not think that the appeal on behalf of the $5 preferred stock in the Court of Appeals should form a basis for denying our petition. In the first place, there is no reason to believe that the representative of the $5 preferred stockholders will ever petition this Court for review. Although such representative filed his notice of appeal to the Court of Appeals on April 20, 1951, we have heard nothing from him to indicate that he even means to prosecute that appeal.

In so far as the issues which might be raised on appeal by the representative of the $5 preferred stockholders are

the same as those presented to this Court by the present petition and consequently would be governed by the arguments contained in the present petition, such representative has been given an opportunity to refute our arguments. On April 26, 1951 we served him, together with the respondents in this proceeding, with the petition, brief and record on appeal, together with notice of filing thereof with this Court. The representative of the $5 preferred stockholders, however, has not seen fit to file a brief in opposition to our petition.

In so far as the issues which may be raised on behalf of the $5 preferred stockholders may be different from those presented to this Court in our petition, such issues arise in a separate appeal and should be considered as an entirely separate proceeding, the failure to prosecute which should not in any way prejudice or delay determination of the present petition on its own merits. In this connection it should be noted that the appeal of your petitioner is from an entirely different part of the District Court's order than the appeal on behalf of the $5 preferred stockholders.

V.

In conclusion we will discuss briefly arguments made in the briefs of respondents relating to legal issues raised by our petition other than the primary charter issue. Under Point V of our petition we contend that the Commission and the District Court violated the opinion of this Court in the *Engineers* case by basing the investment value finding respecting your petitioner's preferred stocks on stock yield levels prevailing during a period of abnormally high market values of a transient nature. Respondents' briefs argue that the opinion of this Court in the *Engineers* case and the opinion of the Court of Appeals for the Third Cir-

cuit in the *Pennsylvania Edison Company* case are contrary to our contention, in that in both such cases the dates as of which the investment value appraisals were made fell within the period between November 1945 and March 1947 involved in the present case. The respondents fail to recognize the following factors which distinguish the *Engineers* and *Pennsylvania Edison* cases from the present case.

In the *Engineers* case this Court emphasized that no one disputed the expert testimony given by Dr. Badger at the Commission hearings to the effect that the period of preferred stock retirement there was not abnormal.* In the *Pennsylvania Edison* case the Court emphasized that the argument as to abnormality of market levels was not only never made before the Commission, but also that the Company insisted upon the date used in that case as a basis for the investment value appraisal. In the present proceeding, on the other hand, the record contains evidence (our petition; p. 32) that a severe change in preferred stock yields was definitely indicated during the period of retirement and consequently that preferred stock market prices might be expected to decrease, as they actually did beginning early in 1947.

Furthermore, the Commission's findings of investment value are intended to be long term appraisals which should not be predicated on market prices prevailing during such a relatively short period as November 1945 to March 1947, which at the time of the Commission's determination were recognized to have been abnormal.

The briefs of the respondents take the position that this Court, in the *Engineers* case, held that 5.45% per annum was a proper rate of interest, or compensation for delay

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* Dr. Badger's testimony in this respect has been demonstrated by later events to be inaccurate.

in payment, to be paid to a holder of $6 preferred stock carrying an investment value of $110 per share. We have shown (our petition; pp. 35-36) that in the *Engineers* case this Court had before it for decision only the question of whether the interest allowed by the Commission was sufficient in amount to be fair to the preferred stockholders and that this Court never purported to decide whether the amount of interest might not be so large as to be unfair to the common stockholders.

The amount of interest here involved is very substantial, being more than $1,900,000, and continues to run each day at the rate of 5.45% per annum on more than $8,400,000. It is respectfully submitted that the legal issues respecting the propriety of the interest payments to the preferred stockholders should be determined by this Court rather than relegated to the Court of Appeals for the Second Circuit which, it is claimed by certain of the respondents in the present case, has already decided this legal question in the *Federal* case in a manner adversely to the contentions of your petitioner in the present case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit and that a hearing upon and determination by this Court of the matters presented in the petition and briefs of your petitioner be had.

Dated, May 31, 1951.

Respectfully submitted,

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Counsel for Petitioner.

SIMPSON THACHER & BARTLETT,
Of Counsel.